(1)

90-1910

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. 90-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAY MARTIN ROSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard S. Emerson, Jr.
Counsel of Record
for Petitioner
257 Deering Avenue
Portland, Maine 04103
(207) 773-0275

QUESTIONS PRESENTED

I. IS THERE A REQUIREMENT OF EXIGENT CIRCUMSTANCES TO JUSTIFY A WARRANTLESS SEARCH OF AN AUTOMOBILE TRUNK UNDER THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES ?

II MAY THE CONDUCT OF POLICE OFFICERS UNFORESEEN TO THE DEFENDANT BE INCLUDED IN A DETERMINATION OF WHAT WAS RELEVANT CONDUCT IN SENTENCING THE DEFENDANT UNDER THE SENTENCING GUIDELINES ?

LIST OF PARTIES

The United States of America named Andrew Stewart Baumwald[1], Jay Martin Rosen, and Antonio M. Dinoflo[2] in an Indictment dated January 19, 1989, in the United States District Court, District of Maine, located in Portland, Maine. (Criminal Docket No. 89-00002 P).

Other individuals, named together with Jay Martin Rosen in a Criminal Complaint preceding the Indictment naming Rosen, were also named in separate criminal Indictments. The District Court consolidated these separate proceedings for the purpose of pre-trial motions and the rulings and opinions thereon. Therefore,

---

[1]. Andrew Stewart Baumwald entered a plea of guilty in the District Court.

[2]. The United States dismissed the case against Antonio M. Dinoflo prior to trial.

certain opinions of the District Court reproduced in the Appendix of this Petition contain references to defendants who were not parties to the proceeding in the court the judgment of which this Petition seeks review.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS,
STATUTES AND REGULATIONS INVOLVED.....4

STATEMENT OF THE CASE.....8

ARGUMENT.....14

APPENDIX.....42 [apx.1]

TABLE OF AUTHORITIES

CASES:

Katz v. United States, 389 U.S. 347 (1967) 14, 22

Niro v. United States, 388 F.2d 535 (1st Cir.1968) 20

United States v. Adams, 621 F.2d 41 (1st Cir.1980) 14

United States v. Cresta, 825 F.2d 538 (1st Cir.1987) 17

United States v. Curzi, 867 F.2d 36 (1st Cir.1989) 17

United States v. Eaton, 676 F.Supp. 362 (D.Me.1988) 19

United States v. Elledge, 723 F.2d 864 (11th Cir.1984) 27, 36

United States v. Mitchell, 538 F.2d 1230 (5th Cir.1976) 17

United States v. O'Meara, 895 F.2d 1216 (8th Cir.1990) 34, 35

United States v. Panitz, 907 F.2d 1267 (1st Cir.1990) 20, 21, 23

United States v. Rosen, 829 F.2d 839 (1st Cir.1991) 23, 30, 39

United States v. Ross, 456 U.S. 798 (1982) 15, 16

United States v. Salazar, 805 F.2d 1394 (9th Cir.1986) 19

United States v. Santiago, 828 F.2d 866 (1st Cir.1987) 20

United States v. Vopravil, 891 F.2d 155 (7th Cir.1989) 27

United States v. White, 888 F.2d 490 (7th Cir.1989) 38, 39

United States v. Williams, 630 F.2d 1322 (9th Cir.1980), cert. den. 449 U.S. 865 16

Wong Sun v. United States, 371 U.S. 471 (1963) 24

CONSTITUTIONAL PROVISIONS:

Amendment IV of the Constitution of the United States 15, 23

Amendment V of the Constitution of the United States 40

STATUTES AND REGULATIONS:

United States Sentencing Commission, Guidelines Manual, Subsection 1B1.3, comment. (n.1) 26, 30-32, 36

United States Sentencing Commission, Guidelines Manual, Subsection 1B1.3(a)(1) 25, 28, 30, 31, 35

United States Sentencing Commission, Guidelines Manual, Subsection 1B1.3(a)(2) 25, 28, 31, 35, 38

OPINIONS BELOW

1. United States v. Baumwald, 1989 WL 135944 (D.Me.) Memorandum of Decision On Defendants' Motion to Dismiss For Outrageous Government Conduct. This opinion was not reported in the Federal Supplement.

2. United States v. Baumwald, 720 F.Supp. 226 (D.Me.1989), Memorandum of Decision and Order on Defendants' Motions to Suppress Statements and Evidence.

3. United States v. Panitz, 907 F.2d 1267 (1st Cir.1990).

4. United States v. Rosen, 929 F.2d 839 (1st Cir.1991).

JURISDICTION

On July 27, 1989, the District Court, District of Maine entered a Memorandum of Decision and Order On Defendants' Motions to Suppress Statements and Evidence which denied the Petitioner's Motion To Suppress Statements and Evidence.

On June 25, 1990, the District Court entered Judgment Including Sentence Under the Sentencing Reform Act.

On April 5, 1991, the Judgment of the District Court was affirmed by The United States Court of Appeals for the First Circuit.

On April 29, 1991, The United States Court of Appeals For the First Circuit denied a Petition for Rehearing on its decision to affirm the Judgment of the District Court.

The Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §

1257(a) and the Rules of the Supreme Court of the United States as effective January 1, 1990. (specifically Rules 10.1, 12.1 and 13.1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendment IV of the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V of the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Sentencing Commission, Guidelines Manual, Sections 1B1.3(a)(1) and (2):

> Relevant Conduct (Factors that Determine the Guideline Range)
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1)all acts and omissions committed or aided and abetted by the defendant, or

for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2)solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;... .

United States Sentencing Commission, Guidelines Manual, Section 1B1.3, comment. (n.1) (in relevant part)

Conduct "for which the defendant would be otherwise accountable", as used in this subsection (a)(1) includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant.... Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level

under this guideline.

STATEMENT OF THE CASE

In November of 1988, agents of the United States Drug Enforcement Administration transported approximately 10,000 pounds of marijuana from Columbia to Maine. (Summary Report of Michael Cuniff, Vol. 5, No. 18)[3] The Drug Enforcement Administration (hereafter DEA) originally planned for a vessel, loaded at Bonaire, to sail to Maine, but when the vessel encountered mechanical difficulties, it was towed by a U.S. Coast Guard ship to a location in Puerto Rico, where the load was transferred to aircraft for flight to a storage facility in Maine. Id.

Later in November of 1988, DEA cooperating individuals contacted Michael Goldin in Miami, Florida, and advised him

---

[3]. References to exhibits and pleadings are denoted by volume and item number under the Certificate of the District Court. References to the transcript of the hearing on the Motion To Suppress, June 22, 1989, appear as (S.T. [pg #]).

that there was 10,000 pounds of marijuana in Maine and the individuals suggested to Goldin that he distribute the marijuana to clients who could pay cash. Id. Goldin developed a list of about 12 possible clients and he and the cooperating individuals flew to Boston, rented an automobile, and drove to a motel near Portland, Maine. Id.

Having arrived in Maine, the cooperating individuals contacted their supervising DEA officials and arrangements were made for Goldin to examine the marijuana stash. Id. After Goldin examined the marijuana, he made a number of phone calls and told the cooperating individuals that various people would be coming to Maine to purchase the marijuana. Id. Among those coming to Maine, Goldin said, were Andrew Baumwald and his two drivers. Id.

Baumwald arrived in Maine with the drivers, one of whom was Jay Rosen. Id. Goldin obtained the keys to Rosen's BMW automobile and the Ford LTD automobile driven by Antonia Dinolofo. Id. The keys and the cars were turned over to DEA agents. (S.T.21).

DEA agents took the LTD, loaded the trunk with marijuana, and returned it to the motel where Rosen and Dinolofo were staying. (S.T.22). Dinolofo entered her vehicle in the parking lot and proceeded to drive on to the Maine Turnpike where she was stopped and arrested by police agents. (S.T.22).

DEA agents, at the direction of Michael Cuniff, also picked up Rosen's BMW and loaded the trunk with marijuana. (S.T.23). The BMW was returned by agents to the motel where Rosen stayed after Dinolofo had already departed. (S.T.24)

Both Rosen and Baumwald, under constant DEA surveillance, entered the BMW in the parking lot of the motel and drove on to the Maine Turnpike heading south, where they were stopped by police agents who were in constant communication with the DEA agents who had loaded the trunk of the vehicle with marijuana. (S.T.24).

The trunk of Rosen's BMW automobile was searched without a warrant where it was stopped on the Maine Turnpike, the marijuana observed, and Rosen was arrested.

FEDERAL JURISDICTION

By Indictment dated January 19, 1989, Jay Martin Rosen was charged in the United States District Court, District of Maine, with conspiracy to possess with intent to distribute in excess of 50 kilograms of marijuana in violation of Title 21, United States Code, Section 846 (Count I). In the

same Indictment, Rosen was also charged with possession with intent to distribute in excess of 50 kilograms of marijuana in violation of Title 21, United States Code, Section 812. (Count III)

The Defendant appeared before the District Court on August 4, 1989 and entered a conditional guilty plea to Count I of the Indictment charging conspiracy. The Government dismissed Count III of the Indictment, charging possession, against the Defendant on June 18, 1990. Jay Rosen was sentenced on Count I of the Indictment on June 18, 1990 to 51 months in the custody of the United States Bureau of Prisons.

The United States consented, by virtue of the Defendant's plea of guilty, to the Defendant's right to seek review, inter alia, of the District Court's pre-trial ruling on a Motion To Suppress filed by the

Defendant. The Defendant also appealed from The Judgment Including Sentence Under the Sentencing Reform Act, dated and entered June 25, 1990.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS SEARCH OF ROSEN'S VEHICLE.

Warrantless searches and seizures are constitutionally impermissible unless supported by probable cause and exigent circumstances. Katz v. United States, 389 U.S. 347 (1967). Exigent circumstances are defined as "such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." United States v. Adams, 621 F.2d 41, 44 (1st Cir.1980).

In the case at bar, Jay Rosen was stopped by police as he traveled in his vehicle southbound on the Maine Turnpike. The officers who stopped Rosen, and who

searched his vehicle, knew, prior to the stop, the vehicle description and registration number, and that the trunk would contain marijuana. (S.T.299-300, 383). Rosen's stop, the search, and his arrest were part of a prearranged plan by the DEA to stop and arrest a number of individuals driving automobiles loaded by the DEA with marijuana. (S.T.377-379)

In United States v. Ross, 456 U.S. 798 (1982), the Court spoke of the "automobile exception" to the warrant requirement of the fourth amendment to the United States Constitution. The reasoning behind the "automobile exception" was that vehicles, by their inherently transient nature, may easily be removed from the subsequent reach of a judicially approved search. In this case, the government exercised and maintained control over the automobiles in question. These were not vehicle stops

made spontaneously by a single officer. The vehicles were delivered to a stationary location (the parking lot of the Sheraton Inn), and when they were moved, the direction was known in advance. To the extent that movement of Rosen's vehicle might imply an exigency, any exigency was created entirely by police authorities. The inherent exigency presumed by the Court in Ross was not present, and the government should not be allowed to justify the search of the defendants' trunks by technical application of the "automobile exception". See United States v. Williams, 630 F.2d 1322 (9th Cir.1980), cert. den. 449 U.S. 865. (where there was no chance that motor home would disappear in time it takes to obtain warrant, automobile exception to warrant did not apply).

Authorities are not permitted to deliberately wait for exigent circumstances

to arise in order to take advantage of the automobile exception to the warrant requirement. United States v. Mitchell, 538 F.2d 1230 (5th Cir.1976); Compare United States v. Cresta, 825 F.2d 538 (1st Cir.1987). Nor are police allowed to actually create an exigency and rely upon it to justify a warrantless search. See United States v. Curzi, 867 F.2d 36, at 43 n.6 (1st Cir.1989)("Circumstances deliberately created by the police themselves cannot justify a warrantless search.").

The District Court felt that this is not a case in which the government agents deliberately created exigent circumstances. (Memorandum of Decision and Order on Defendants' Motions To Suppress Statements and Evidence, see Appendix). The District Court erred as a matter of law, because when the government has arranged a

situation where a vehicle is loaded with marijuana to be driven off by a suspect, this should be considered, in fact, a deliberately created exigency. It should not be necessary for the evidence and testimony to show the subjective intent, on the part of authorities, to avoid the warrant requirement. Where the suppression doctrine is designed to avoid deliberate police misconduct, courts should assess police conduct by the design of the situation they engineer rather than by direct evidence of intent to avoid the warrant requirement. This method of evaluating police conduct should be used because it is nearly impossible for a defendant to present evidence as to the subjective intent of police.

Anticipatory warrants could have been acquired (S.T.102), but even if there were countervailing factors justifying the

failure to do so, there was no reason why a warrant could not have been issued before the trunk of the Rosen vehicle was opened. The police designed an investigation which was certain to involve the stop of a suspect vehicle, and they had the opportunity to obtain anticipatory warrants, but elected not to do so. Once the vehicles were stopped and their occupants arrested on probable cause, the police plan should have included the effort to obtain warrants before opening the trunk of the vehicle.

Any search incident to arrest would only properly have extended to the passenger compartment of the car. United States v. Salazar, 805 F.2d 1394 (9th Cir.1986); United States v. Eaton, 676 F.Supp. 362 (D.Me.1988). The police agents knew well in advance of the controlled delivery that they would be loading the

marijuana in an autobile trunk and could have obtained arrest and search warrants prior to delivery, and unless exigent circumstances actually arose, United States v. Santiago, 828 F.2d 866 (1st Cir.1987), a fully anticipated search and seizure cannot be justified by exigent circumstances. Niro v. United States, 388 F.2d 535, 539-40. (1st Cir.1968).

> If no penalty will ever attach to a failure to seek a warrant, as distinguished from the officers making their own, correct, determination of probable cause, warrants will never be sought, at least when the search is expected to be accompanied by an arrest.

Niro v. United States, supra 388 F.2d at 539.

In United States v. Panitz, 907 F.2d 1267 (1st Cir.1990)[4], the Court said the

---

[4]. In this case, the First Circuit Court of Appeals issued an opinion in one of the cases which had been consolidated with Defendant Rosen's case for the purposes of pre-trial motions. Defendants Panitz and Rosen raised the issue of whether the stop and search of their vehicles was

existence of probable cause justifies a warrantless seizure and reasonable search of a motor vehicle lawfully stopped in transit or parked in a public place, whether or not exigent circumstances prevailed at either the time of the seizure or the time of the search.

The motor vehicle cases cited within Panitz have historically implied an exigency because of the motor vehicle's inherent mobility. No independent showing of exigency has been necessary in these cases as the mobility of the vehicle implies the exigency.

A fundamentally different analysis should be applied where police have planned the employment of a vehicle and loaded the probable cause (marijuana) into its trunk.

---

legal. The opinion below in United States v. Rosen, 929 F.2d 829 (1st Cir.1991), adopted the reasoning of Panitz in rejecting Rosen's claim of error.

No longer can it be said the exigency is implied by the suspect's use of a vehicle. Where use of the vehicle was by prearranged police design, the concept of "exigency" as urgent circumstances is nullified. It is more accurate to say that police have used a vehicle in their operation and the choice of using a vehicle, when there are many alternative methods available to police must, in any practical sense, be viewed as exigent circumstances intentionally created by the police.

The United States Supreme Court has never excepted motor vehicles searches from the governing principle that probable cause and exigent circumstances are needed to justify a warrantless search. Katz v. United States, supra, 389 U.S. 347. Where police may suddenly and unexpectedly be confronted with a situation involving a moving vehicle, an exigency is ordinarily

implied, and no independent showing of exigency may be required. The First Circuit's ruling in Panitz, however, as applied to United States v. Rosen, 829 F.2d 839 (1st Cir.1991), constitutes a new and unnecessary weakening of Fourth Amendment protection, by eliminating the exigency requirement entirely, regardless of the facts of the individual case. For the first time, the court explicitly abolished the exigency requirement and pronounced it "immaterial" in warrantless searches of automobiles. Under the ruling of the First Circuit Court of Appeals in Panitz, supra, police may effect, as they did in the instant case, a warrantless stop and search of a motor vehicle, even when no exigency is logically implied.

The elimination of the exigency requirement, including the implied exigency requirement, leaves no protection against

the intentional use of overzealous police tactics involving automobile searches. This is what happened in the case at bar, where police loaded Defendant Rosen's vehicle with marijuana, knowing he would drive off and be stopped a short distance away by other police.

The marijuana seized from the trunk of the Defendant's vehicle was the fruit of an illegal search and the marijuana evidence should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

II. THE DISTRICT COURT ERRED IN ITS DETERMINATION OF WHAT WAS RELEVANT CONDUCT FOR THE PURPOSE OF SENTENCING UNDER THE SENTENCING GUIDELINES.

THE DEFENDANT WAS IMPROPERLY PUNISHED FOR THE UNFORESEEABLE CONDUCT OF POLICE OFFICERS.

The specific issue presented by the facts is whether the quantity of drugs loaded by the Government agents into the vehicle used by Defendant Rosen should be used to tabulate the Base Offense Level for the Defendant, or whether the quantity should be determined by what Rosen bargained for and expected.

Under United States Sentencing Commission, Guidelines Manual, Subsections 1B1.3(a)(1) and 1B1.3(a)(2), a court may establish the relevant conduct to determine the Guideline range. These Subsections allow a court to consider

> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, that occurred during

> the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense; [and]
> (2) solely with respect to [closely related offenses], all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.

The Application Notes to the two Guidelines quoted above add that the defendant may be sentenced for conduct "that the defendant counseled, commanded, induced, procured, or willfully caused". U.S.S.G. Section 1B1.3, comment. (n.1). The common thread connecting all of these terms is affirmative conduct with a high degree of deliberate intent.

The Application Notes also explain that a defendant will be sentenced for the conduct of others when the conduct is jointly undertaken criminal activity which was reasonably foreseeable by the

defendant. In the instant case, "the conduct of others" is that of the Government agents who loaded the marijuana, and it must be excluded as relevant conduct because it is a legal impossibility for a defendant to jointly undertake criminal activity, or conspire, with a Government agent. United States v. Elledge, 723 F.2d 864 (11th Cir.1984).

The conspiracy to which the Defendant pled guilty is described in recent caselaw as a negotiation count, and the court can exclude amounts from Guideline calculations if it finds the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount of the illegal substance. United States v. Vopravil, 891 F.2d 155 (7th Cir. 1989). As with most reported cases Vopravil focuses on the realistic intent of the defendant rather than what is unintended and

unforeseen by a defendant. A Government "sting" operation, such as the one in the case at bar, introduces the element of Government control over the supplied or available amount of marijuana. In order to fairly appraise the Defendant's responsibility in terms of the quantity of drugs, it must be determined what the Defendant intended to negotiate and what he could reasonably foresee.

The Government was able to show that Jay Rosen was made aware, at the moment he was about to enter his BMW automobile, of what amounts were placed in his vehicle and that of Antonia Dinolofo, who had previously driven away. These facts do not demonstrate, under U.S.S.G Section 1B1.3(a)(1), the type of affirmative conduct which is relevant in computing a base offense level. Additionally, under U.S.S.G. Section 1B1.3(a)(2), the amount of

marijuana is not relevant conduct because Rosen did not negotiate for nor could he reasonably foresee the extent of the marijuana load. Rosen paid for approximately 30 pounds of marijuana, and if the Sentencing Guidelines are applicable, it is this amount which should be used to compute the Base Offense Level.

The District Court found that calculation under the Guidelines of the length of sentence could not include the weight of the marijuana which was driven away by Antonia Dinolofo because Rosen had no knowledge or control of this marijuana. The District Court also decided that, once he was informed of the 150 pounds of marijuana in the BMW trunk, Rosen could be sentenced for that amount, even though he had bargained for 30 pounds, because he did not withdraw from the criminal activity at that point.

In reviewing the Judgment of the District Court, the First Circuit Court of Appeals, United States v. Rosen, 829 F.2d 839, supra, in section IV of its opinion, discussed the Defendant's argument that his base offense level was improperly calculated to include a quantity of drugs determined by and loaded by undercover agents, into the vehicle that he was to drive away. This Court concluded that, even though Rosen bargained for 30 pounds of marijuana, because he learned the quantity actually loaded was 150 pounds just prior to driving away, and because he did not refuse the additional amount, Rosen thereby consented to transport the larger amount in "furtherance of the offense".

In reaching its opinion, the First Circuit Court of Appeals construed Section 1B1.3(a)(1) of the Sentencing Guidelines together with the commentary to that

section, U.S.S.G. Section 1B1.3, comment. (n.1). The Circuit Court's opinion focused upon a phrase in Guideline Section 1B1.3(a)(1) which calls for consideration of all acts in "furtherance of the offense", and the court found that Rosen's voluntary act of driving away with the greater than expected amount of marijuana was in furtherance of the offense. Therefore, his base offense level was calculated correctly using the amount of 150 pounds of marijuana. The Petitioner claims this was error because the opinion is inconsistent with the specific guidance provided by the Application Notes under the Commentary to the Sentencing Guidelines, Sections 1B1.3(a)(1) and 1B1.3(a)(2), which explain that:

> 1. Conduct "for which the defendant would be otherwise accountable" as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.)

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant.... Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

U.S.S.G. Section 1B1.3, comment. (n.1).

The above Application Notes call for an inquiry into whether the defendant could reasonably foresee the criminal conduct of others. The Government did not produce evidence relevant to this inquiry and neither the District Court nor the Court of Appeals properly applied the "foreseeability" test to the case at bar. The Circuit Court erred in merely concluding the Defendant was responsible

for acts precipitated by Government agents because they were "in furtherance of the offense". Such a conclusion ignored the requirement that the acts of the Government agents be reasonably foreseeable to the Defendant.

The facts establish that Rosen's activity was undertaken in concert with others who included government agents. The activity of loading the marijuana, and deciding what amount would be loaded into Rosen's car trunk, was exclusively the activity of government agents. The facts also establish that the decision to place 150 pounds of marijuana into Rosen's truck, undertaken by others with whom Rosen acted in concert, was not within the scope of the defendant's agreement to transport 30 pounds of marijuana.

In this situation, the Guideline commentary limits a defendant's liability

to the scope of the conspiracy agreement, unless the activity beyond the scope of the agreement was reasonably foreseeable. There was no finding by the District Court that this was the case. The amount loaded into Rosen's, trunk, 150 pounds of marijuana, was five times the amount bargained for. Without speculating as to the government agents' motive in choosing 150 pounds instead of 30, it should be apparent the amount loaded was not foreseeable to Rosen.

A defendant, in certain instances, may be liable for a quantity of drugs delivered by police agents which is more than the amount expressly bargained for if the additional amount is reasonably foreseeable to the defendant. United States v. O'Meara, 895 F.2d 1216 (8th Cir.1990). In O'Meara, the sentencing court specifically addressed the point that the amount of cocaine

bargained for, six ounces, was not materially different from the sale amount, which was eight ounces. The record in O'Meara also supported the conclusion that the additional amount was foreseeable in terms of the negotiations prior to sale. In Rosen's case, the amount of drugs loaded into the BMW trunk by police was five times the amount bargained for and there was no finding nor evidence to support a finding that this was foreseeable to Rosen.

The Application Notes under Sentencing Guidelines, Sections 1B1.3(a)(1) and 1B1.3(a)(2)[5] were amended, effective November 1, 1989, with the express purpose of clarifying the "definition of conduct for which the defendant is 'otherwise accountable'". (Amendments to the Sentencing Guidelines Manual of October

---

[5] The opinion of the Circuit Court quotes the amended version of the Application Notes.

1987, Appendix C, Amendment 78). Prior to the Amendment, the Commentary to § 1B1.3 captioned "Application Notes" read in pertinent part:

> If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or reasonably foreseeable by the defendant. ...

(emphasis added)

Two substantive points are clarified by the Amendment replacing this section of the Commentary. First, the defendant's relevant conduct includes any conduct undertaken in concert with others, whether or not charged as a conspiracy. This change is germane to Defendant Rosen because he undertook criminal activity in concert with others who were government agents, but he could not conspire with them as a matter of law. United States v. Elledge, supra, 723 F.2d 864 (11th Cir.1984). Second, the Amendment does not

carry forward the phrase including conduct "that was known to" the defendant, but only conduct that was "reasonably foreseeable by the defendant". Importantly, Rosen could not foresee the Government's decision to load 150 pounds of marijuana instead of 30 pounds, but he was sentenced for 150 pounds because this amount was made "known to" him by agents immediately prior to his departure.

For the court to attribute the government agents' unforeseen activity to Rosen because he had knowledge of the activity just prior to his departure, overlooks the instruction of the Sentencing Guideline's Commentary which has explained that Rosen is not "otherwise accountable" for the agents decision to place 150 pounds of marijuana in the BMW trunk unless this was foreseeable to Rosen. The opinion of the Circuit Court did not turn to case

law in its construction of the applicable Sentencing Guidelines. While there may be a dearth of decided cases on the issue raised by Petitioner Rosen as to his base offense level computation, the Seventh Circuit Court of Appeals has had occasion to consider the correct application of U.S.S.G. Section 1B1.3(a)(2) when there is a disparity between what a defendant plans and what amount he actually receives in drug quantities. United States v. White, 888 F.2d 490 (7th Cir.1989). In White, a defendant ordered and paid for approximately 300 grams of cocaine, but when two packages containing the cocaine were intercepted by authorities, most of the drug was removed and only 1.88 grams allowed to continue on to the defendant. The White Court ruled that the DEA's decision to drain most of the cocaine from the packages would not reduce the sentence

because "if the DEA had added an extra 200 grams to the original 302, this would not bump White's offense up in seriousness." White supra at 498. White indicates that, when a Drug Enforcement Agent removes a quantity of drugs from a bargained for shipment, the base offense level is computed on the amount originally bargained for. The Seventh Circuit's reasoning contrasts sharply with the opinion in Rosen because the First Circuit Court has said that additional drug amounts, added by government agents to a bargained for shipment, do increase the seriousness of the offense, unless the additional amount is rejected by a defendant.

In the interests of justice this Court should consider the conflict between the Rosen case and the opinion in White supra, as well as the District and Circuits Court's failure to inquire into the

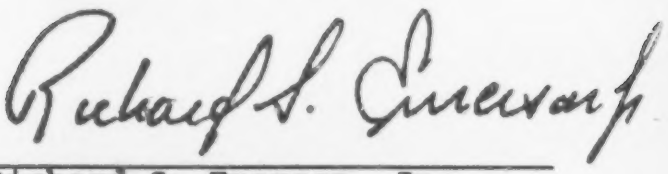
reasonable foreseeability of the police agents' conduct.

If Rosen's sentence is calculated upon Government conduct not intended nor anticipated by a defendant, and over which he had no control, the sentence is unconstitutional under the Due Process Clause of the United States Constitution, because there is no fair warning as to what punishment might be expected before commission of the crime, and because Rosen's sentence is contrary to the Federal law of sentencing as intended by the Sentencing Guidelines Commission.

CONCLUSION

For the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,



Richard S. Emerson, Jr.,
Counsel of Record for
Petitioner

Portland, Maine

June 3, 1991

APPENDIX

Contents:

Memorandum of Decision and Order on Defendant's Motions to Suppress Statements and Evidence.....2

Amended Procedural Order Scheduling Guideline Sentencing Hearing and Imposition of Sentence.....43

Memorandum of Sentencing Judgment.....46

Opinion of the First Circuit Court of Appeals in United States v. Rosen.....56

Judgment of the First Circuit Court of Appeals in United States v. Rosen.....72

Order denying rehearing in United States v. Rosen.....72

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v. Criminal No. 89-00002-P

ANDREW STEWART BAUMWALD et al.

UNITED STATES OF AMERICA

v. Criminal No. 89-00003-P

NORMAN J. PANITZ, et al.

UNITED STATES OF AMERICA

v. Criminal No. 89-00004-P

JOSEPH JOHN FRISONE, et al.

UNITED STATES OF AMERICA

v. Criminal No. 89-00005-P

ROBERT ALAN BERZON, et al.

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS STATEMENTS AND EVIDENCE

In these actions Defendants are charged

with conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 2. The charges are the result of an investigation by the United States Drug Enforcement Agency and other law enforcement agencies. Defendants Rosen, DiNolfo, Solomon Panitz, Norman Panitz, Hertz, Haskins, Braun, Novak, and Berzon[1] have moved to suppress statements made by them, evidence taken from them, or both.

Facts

In the fall of 1988, Michael Goldin, an unindicted coconspirator, planned the importation of 10,000 pounds of marijuana into Maine. Two cooperating individuals ["CIs"], SCI-86-0010 and SGI-86-0011,

---

[1]The hearing on Defendant Berzon's motion to suppress statements was postponed because of his counsel's inability to appear at the hearing.

arranged for the transfer of the marijuana for Goldin, originally from Columbia, by boat through French West Indies to Maine. On November 20, 1988, Goldin and the two Cis came to South Portland, Maine via Boston. Goldin went to the Sheraton Motor Inn next to an exit on the Maine Turnpike, where he was to stay.

Later that day, Goldin met undercover DEA Agent Bansmer, and they went together to the Damariscotta area in Maine to inspect the marijuana. Goldin selected marijuana samples, most of which were later found in a room at the Sheraton. Goldin agreed to pay the Cis and the undercover agents $660,000 for the transportation, storage and processing of the marijuana.

Goldin was in frequent communication with various individuals concerning the deal. On the twenty-first, Goldin told the CIs that Joe, later identified as Defendant

Frisone, was en route, bringing money with him, and that Goldin hoped to sell him a large quantity of marijuana. Goldin also told the CIs that Andy was en route to Maine with a car and a truck driven by a fifty-five year old woman. Andy was later identified as Defendant Andrew Baumwald. Goldin also reported that Defendant Berzon and "Toy," later identified as Defendant Novak, were coming to Portland in connection with the marijuana deal.

After meeting at the Sheraton later in the afternoon, Goldin told the CIs that Andy had arrived and was staying in a particular room at the Sheraton. Goldin said Andy had brought a Ford and a BMW with him as well as two drivers, a male and a fifty-five year old woman. The woman was later identified as Defendant DiNolfo, and the man as Defendant Rosen. Goldin said that he had received the keys for both cars and $15,000

from Andy and that Andy would have $250,000 in cash for more marijuana after the first was distributed. CI 0011 told Goldin that they could not load the cars until Tuesday, November 22, and declined to keep the keys or the money. The officers learned that both Joe and Berzon had arrived.

Over the next two days a pattern of controlled delivery and surveillance was followed, resulting in the arrest of numerous Defendants. Goldin would give the keys of a particular vehicle to undercover Special Agent Gagner or another member of the undercover transport group, and Gagner, sometimes with the assistance of Agent Bansmer, would drive it to Scarborough Police barracks, where the marijuana was being stored. Goldin had told Gagner to fill the trunks or cargo areas of the vehicles with marijuana and that was accomplished. Gagner then drove each vehicle back to the vicinity

of the Sheraton parking lot where he left it with keys hidden in it, and numerous law enforcement officers began surveillance. Many of the surveillances are documented by videotapes as well as by reports of the officers. After varying waits, a Defendant or group of Defendants would retrieve the vehicle and head south on the Maine Turnpike.[2] Surveillance of the vehicle was

---

[2]There were a few variations on this theme. Some of the drivers stopped for gasoline before driving south. Defendant Solomon Panitz, who left the hotel at approximately 2:00 a.m. in a Chevrolet Caprice, did various maneuvers apparently designed to determine if he were being surveilled and to elude any followers. Surveillance of Panitz's car was briefly interrupted when he entered the Maine Turnpike by means of a wrong-way ramp. It was reestablished a short time later by officers waiting on the Maine Turnpike.

Also, a pair of vehicles, the black Cadillac driven by Defendant Novak and the Jeep driven by Defendant Braun with Defendant Berzon as a passenger, proceeded in tandem down the highway. The Jeep was not loaded with marijuana. It had carried Defendant Haskins to the truck in which he was later arrested and had brought Defendant Novak to the Cadillac.

maintained.

Teams of law enforcement officers had been informed of the details of the investigation and of the information known to date. They were later advised of the description of the vehicles that had been loaded with marijuana. The officers had been instructed by Special Agent Cunniff, the DEA officer in charge, to make a Terry stop of each vehicle and to determine whether, based on the investigation information and the circumstances known to them at the time of their stop, they should arrest the occupants of the vehicles.

The stops for the most part were made around Exit 2 on the Maine Turnpike in Wells, Maine. After a routine traffic stop[3] was conducted by a state police officer and questions concerning point of departure and

---

[3]Variations in this procedure are discussed with regard to individual Defendants in the section on suppression of statements.

destination were asked, Defendants were informed by another agent that the stop was part of a routine drug interdiction program carried out by the DEA and the state law enforcement officers. The purpose, in fact, was to identify individuals involved with the cars carrying the marijuana and to arrest them, if appropriate. In the course of a series of questions about drugs, the drivers were asked if the officers could look in the trunk or cargo areas of the stopped vehicles. Consent was given only by Defendant Haskins. Most of the Defendants denied knowledge of any marijuana, and indeed none had looked into the trunk or cargo area of his or her vehicle before leaving the Sheraton parking lot.

Despite the lack of consent in most cases, the officers looked into the trunk or cargo area of each vehicle and, having seen the marijuana, placed Defendants under ar-

rest. Miranda warnings were administered to each Defendant and they were transported back to lock-ups in Portland. The vehicles were removed by teams of officers who had been waiting to assist if arrests should be made.

The Court notes that passengers in the cars transporting marijuana were arrested as well as the drivers. Also arrested were Defendants Braun and Berzon, the occupants of the Jeep which had dropped two of the drivers off at two of the waiting marijuana-filled vehicles and which had then traveled in tandem with one of those vehicles on the Maine Turnpike.

In this manner, on November 22, 1988, Defendant DiNolfo was arrested with the Ford LTD, Defendants Baumwald and Rosen were arrested with the BMW, Defendant Haskins was arrested with a pickup truck, Defendant Novak was arrested with a Cadillac, and

Defendants Berzon and Braun were arrested with the Jeep. Early on the morning on November 23, Defendant Solomon Panitz was arrested in the Chevrolet Caprice, and later that morning Defendants Frisone, Hertz, and Lopopolo[4] were arrested in a gold Mercedes.[5] All of the vehicles except the Jeep contained large quantities of marijuana that had been placed in them by the investigating officers on instructions by Goldin. Tr. 46.

Some of the Defendants made statements at the time of their arrests or while being

---

[4]The government has dismissed the charges brought against Ms. Lopopolo.

[5]Before these arrests were made but after the Panitz car had been loaded and the Mercedes had been consigned to the undercover agents, Goldin, after being confronted by DEA agents, decided to cooperate with the government. He told the officers that Frisone had traveled to Portland with Defendants Hertz and Lopopolo, bringing $50,000 with him. Although Frisone reportedly was not happy with the quality of the marijuana, he agreed to take some back to New York.

transported to Portland. The circumstances of these statements will be discussed more fully later. After the arrests of all of the individuals in the car had been accomplished, on the after of November 23, 1988, Special Agent Cunniff went to Room 518 of the Sheraton Motor Inn, identified himself, and arrested Jaime Suarez. The other occupant of the room identified himself as Norman Panitz. After asking Panitz a few questions, Agent Cunniff also arrested him. Some of the sample marijuana given to Goldin was found in the closet of the room.

Discussion

The first issue raised by Defendants' motions is whether the arresting officers could stop and search the vehicles as they did without warrants. The agents had been told by Goldin that he was having various people come to Maine to buy the marijuana

and take it back to New York. Goldin had mentioned some of the people he expected by first name, description, or nickname, but he had not provided their names so the agents did not know exactly who was involved in the conspiracy. A plan was set up whereby Goldin gave the keys for a number of different automobiles to Special Agent Gagner or other undercover personnel so that Gagner and others would load them with the marijuana that had been brought from Columbia. Given the information from Goldin and the nature of the plan -- that Gagner would return the cars to the Sheraton parking lot and leave them there in a specific area with the keys in them for pick-up -- the officers had probable cause to believe that individuals who came, got into the cars, and headed south with them on the turnpike were involved in criminal activity. The officers, therefore, had

probable cause to stop the cars and arrest the occupants, particularly after the initial questioning determined where they were from and where they were going.

Once there was probable cause to arrest the occupants of the marijuana-bearing vehicles under New York v. Belton, 453, U.S. 454, 460 (1981), the officers permissibly could search, incident to arrest, the passenger compartments of the vehicles.[6]

In the more recent case of United States v. Ross, 456 U.S. 798 (1982), the Supreme Court referred to the automobile exception to the warrant requirement and "consider[ed] the extent to which police

---

[6]The government incorrectly argues that Belton makes permissible searches of entire vehicles incident to arrest. The Belton majority plainly stated: "Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Belton, 453 U.S. at 460.

officers -- who have legitimately stopped an automobile and who have probable cause to believe contraband is concealed somewhere within it -- may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view." The Court held that "they may conduct a search of the vehicle that is as thorough as a magistrate could authorized in a warrant 'particularly describing the places to be searched.'" Id at 800, 809.

The officers here obviously had probable cause to search vehicles. They knew that there was marijuana in the trunks or cargo areas because they had put it there. Certainly a magistrate, aware of such knowledge, could have issued a warrant for searches of the trunks of the automobiles in question.

Defendants suggest that the automobile exception to the warrant requirement

initially set forth in Carroll v. United States, 267 U.S. 132 (1925), does not pertain here because the automobile exception is based on exigent circumstances which were not present in this case. The Court persuaded, however, that in Ross, 456 U.S. at 807-08, and the more recent case of California v. Carney, 471 U.S. 386 (1985), the Supreme Court has made clear that probable cause alone suffices to justify the warrantless search of a vehicle. See United States v. $29,000 U.S. Currency, 715 F.2d 853 (4th Cir. 1984).

In any event, this is not a case in which the agents were required to obtain a warrant before stopping the subject vehicles on the Maine Turnpike.[7] As the court said

---

[7]The Court notes that most of the cases cited by Defendants to the effect that a showing of exigent circumstances is required for warrantless searches and seizures are not cases involving the search of vehicles but rather the search of dwellings.

in United States v. Cresta, 825 F.2d 538, 553 (1st Cir. 1987), "[there] exigent factors did arise and it does not matter when they did." The fact that the agents might have obtained a warrant earlier does not negate the possibility of a current situation requiring their prompt action. Cardwell v. Lewis, 417 U.S. 583, 596 (1974). Once the individuals picking up the loaded cars arrived, there was no time to get a warrant because the drivers might escape with the marijuana in the cars.

This is not a case in which the government agents deliberately created exigent circumstances in order to create an exception to the warrant requirement. See Cresta, 825 F.2d at 553. Although the agents presumably had probable cause to get warrants as soon as the cars were loaded, there were "countervailing factors" justifying the failure to do so even though

the nature of the searches and seizures were fully anticipated. See Niro v. United States, 388 F.2d 535, 539 (1st Cir. 1968).

The objective of the DEA controlled delivery operation on November 21-23, 1988 was not to search the vehicles for marijuana but to identify persons involved in the drug distribution conspiracy with Goldin by stopping cars provided to them by Goldin and loaded by them with marijuana at Goldin's behest. Goldin, who was not cooperating with the government until early on the morning of November 23, 1988, controlled the details of the distribution of the marijuana. He arranged for the purchasers to come to the Sheraton, he collected the keys, he told the officers which vehicles to fill, where to pick them up and where to deliver them. For the officers' investigation to be successful, they had to follow Goldin's plan. As Special Agent

Cunniff testified, execution of a warrant could well have frustrated the investigative goal of identifying coconspirators if it were done in view of other participants who were then unknown to the agents or if Goldin or other participants were to find out and become suspicious. Tr. 147.[8] Moreover, the delay sometimes encountered in obtaining a warrant might have generated suspicion in the persons awaiting delivery of their vehicles and prompted their flight. Tr. 148. The Court finds that need to prevent frustration of the whole plan was, in this case, a countervailing factor, see Niro, 388 F.2d at 539 (1st Cir. 1968), or an exigent circumstance, justifying failure to seek a warrant. See United States v. Rengifo, 858

---

[8]The Court also notes that the fact that both the scope of the conspiracy and the identity of the participants were unknown presented a potential safety problem for the officers if they were to obtain and execute warrants for individual vehicles presented.

F.2d 800, 804-05 (1st Cir. 1988) (exigent circumstances exist when a reasonable officer could believe that to delay acting to obtain a warrant would, in all likelihood, permanently frustrate an important police objective).[9]

The Court finds, therefore, that the stops and searches of the vehicles that had been loaded with marijuana by the DEA did not violate the Fourth Amendment.[10]

---

[9]The Court notes that although Goldin had begun to cooperate before the loaded Frisone vehicle was delivered, and the government therefore was in total control of the operation, the same factors militating against the seeking of a warrant were present. The government did not know at that time that the Frisone car was the last that would arrive. Tr. 148. Moreover, a change in the plan previously described to them by Goldin or a delay caused by the seeking of a warrant might have caused Defendants to flee without accepting delivery of the loaded car.

[10]In his Reply Memorandum, Defendant Haskins argues that the consent he gave to search his truck was not voluntary because of the allegedly coercive setting at the time of his arrest. See infra at 19. As has been demonstrated in the text, the

Arrests

Defendant Hertz also challenges his arrest as not being based on probable cause. He asserts correctly that there was no evidence that he was mentioned by Goldin or anyone else as a purchaser or possessor of marijuana, that he had any conversations with Goldin or other undercover agents or informants, or that he knew what was in the trunk of the car. He argues, therefore, that he was arrested simply on the basis of his presence and his association with Defendant Frisone. The Court cannot agree. Defendant Hertz was driving an automobile loaded with marijuana at the time of his arrest. He had come from New York to Maine with Joe [Defendant Frisone], who had been mentioned as a possible purchaser and who was a passenger in the car. Goldin had

---

search of Haskins' truck was permissible whether he gave his consent or not.

mentioned that Hertz had traveled to Maine with Frisone. Tr. 131. Hertz had picked up the car at a specified location after it had been loaded with marijuana. These affirmative steps of coming to Maine with someone identified as a purchaser of marijuana, picking up the car at a specified location, and driving it south are enough for the officers to infer that he was more than merely present at a place where marijuana was found. While lack of knowledge may be an issue to be raised at trial, the Court finds that on the record before it, the officers had probable cause to believe that Defendant Hertz was involved in a conspiracy to possess marijuana with intent to distribute it.

Defendant Norman Panitz has also challenged his arrest on the grounds that Agent Cunniff lacked probable cause. It is plain to the Court, however, that probable

cause to arrest Panitz existed. Cunniff went to Room 518 of the Sheraton, which was Goldin's room. Goldin was the moving force in the marijuana distribution scheme. The night before, when he had become a cooperating witness, Goldin had told cunniff that he had called Norman and asked him to come to Portland to collect money owed him and to bring his brother "Bif" so that Goldin could give Bif some marijuana. Goldin had also told Cunniff that Norman and Bif were in Portland as a result of that conversation. Cunniff knew when he went to Room 518 that a Solomon Panitz had been arrested with a trunk load of marijuana the previous evening.

In response to Cunniff's questions, Defendant Panitz gave his name and said he had a brother Bif. In response to the next few questions, Panitz stated that he did not have a brother Bif and that he was not

staying at the Sheraton.

The fact that Norman Panitz was probably associated in some way with Goldin (he was in his room) and had a brother named Bif made it likely that Panitz was the "Norman" to whom Goldin had referred. The facts that Bif and Norman were in Portland together and that another person named Panitz had been arrested while transporting marijuana made it inferable that Norman had indeed brought his brother to Portland to be given marijuana. Cunniff, therefore, had probable cause to believe that Defendant Panitz was part of the conspiracy.

Defendant Panitz seeks to suppress a key to a room at the Sheraton found during a search of his person after his arrest. He also seeks to suppress the marijuana sample found in Special Agent Gagner's gym bag in the closet of Room 518. The Court will not suppress the key since it was made during a

search incident to Pantiz's custodial arrest. United States v. Robinson, 414 U.S. 218, 235 (1973).

To the extent that Defendant Panitz also seeks to suppress the gym bag with the marijuana sample found in the hotel room's closet after Panitz's arrest, the Court finds that he lacks standing. Goldin and Suarez had been staying in room 518, and it was registered to one or the other of them. No evidence shows that Panitz was anything other than a passing visitor there. He denied he was staying in the Sheraton, and the key to a different Sheraton room was found in his pocket. His mere presence in the hotel room does not give him standing to object to the search of it. United States v. Irizarry, 673 F.2d 554, 556 (1st Cir. 1982). Moreover, the gym bag found belonged to Agent Gagner and had been given by him to Goldin, not Panitz.

Statements[11]

Defendant Rosen

Defendant Rosen was stopped on the Maine Turnpike while driving a BMW, the trunk of which was loaded with marijuana. Trooper Curran, Agent Bryfonski, and another uniformed trooper were in the police car which haled him to roadside. Trooper Curran asked routine traffic-stop type questions, he requested Rosen's license and registration, and asked where he had come from. He then asked Rosen to go to the back of the car where Agent Bryfonski told him that they were conducting a routine drug interdiction program and asked him several questions. Rosen said he had been visiting a friend in Portland, but that he could not recall the people with whom he had visited. Also in response to a questions, he said there was

---

[11]Defendant DiNolfo has withdrawn her motion to suppress statements.

nothing in the trunk. Bryfonski looked in the trunk and placed Rosen and passenger Baumwald under arrest. Bryfonski administered Miranda warnings to Rosen, and Rosen indicated that he understood them. He also indicated he was willing to answer questions. Tr. 386. Rosen then answered Bryfonski's questions about where he had obtained the marijuana and whether he was under direction to make any telephone calls to anyone at that time.

After the arrest, two or three other officers arrived. Defendant Rosen was transported to Portland by Officer Peter DeRice. During the trip, Rosen volunteered some information about having come from New York and staying at the Sheraton, asked DeRice various questions about where they were going, whether he could make a phone call and whether DeRice could recommend an attorney. DeRice responded to the

questions. At one point, Rosen mumbled, and DeRice said "excuse me." Rosen then said, "I didn't think that they would make such a big deal out of a little bit of grass, 100, 130 pounds." DeRice reminded Rosen of his rights.

Defendant Rosen argues that the statements made to Agent Bryfonski after he administered the Miranda warnings should be suppressed[12] because Defendant, having acknowledged that he understood the warnings, did not waive his rights. The record is directly to the contrary. In response to Rosen's counsel's question whether Rosen had acknowledged questions rather than offering information, Bryfonski

---

[12]In his brief, Defendant Rosen does not appear to challenge the admission of statements made before he was formally placed under arrest. The Court notes that the situation until the point of the formal arrest was noncustodial, so no Miranda warnings were required. See United States v. Quinn, 815 F.2d 153 (1st Cir. 1987).

replied:

> He acknowledged to me that he understood the rights that I read to him. He appeared to me to be in a situation, in capacity to be able to understand those rights, and I asked him if he was going to answer any questions. His acknowledgement to me was that he was willing to answer questions. I asked him questions about the Miranda to which he responded.

Tr. 386. The Court finds, therefore, that Defendant Rosen waived his rights under Miranda v. Arizona, 384, U.S. 436 91966), and provided the answers to Agent Bryfonski. Since the answers were not obtained in violation of Defendant's rights, they will not be suppressed.

Defendant Rosen also strenuously challenges the government's ability to use the statements he made to Officer DeRice during the trip to Portland. In its prehearing memorandum, the government had stated that it would not "offer in evidence any statements made by the defendant after

his removal from the scene of his arrest." Defendant argues that he has been seriously prejudiced in his ability to support his motion to suppress because the government's change in position came after the suppression hearing.

The record belies this contention. When the government called Agent Bryfonski, it made clear that his testimony and that of Officer DeRice who was to follow would relate to statements made by Defendant Rosen. Tr. 356. Defense counsel offered not objection tat that point and proceeded to cross-examine Bryfonski. When the government called Officer DeRice, counsel said: "With the exception of Mr. Emerson and Defendant Rosen the government has no further evidence. I have one last witness, Agent DeRice, who received a statement as Mr. Rosen is driven to Portland." Tr. 429. Defense counsel offered no objection at this

point either and conducted a thorough cross-examination of Officer DeRice.

The testimony of Officer DeRice shows that Rosen was not subjected to interrogation by Officer DeRice and that he volunteered the statements made to that officer, having been informed of and having understood his rights under Miranda. The Court, therefore, finds no grounds to suppress Defendant Rosen's statements.

Defendant Haskins

Later on November 22, 188, Trooper Curran and Agent Bryfonski stopped Defendant Haskins in a pickup truck loaded with marijuana. The stop procedure was basically the same as that used for Rosen except that it occurred after dark and there were a number of other agents nearby with guns drawn because they had heard that Haskins might be armed. Agent Bryfonski told Haskins of the spurious routine drug

interdiction program and asked if he could inspect the truck. Haskins said that he could. Having seen the marijuana and placed Haskins under arrest, Bryfonski administered the Miranda warnings to him and asked him if he were willing to cooperate. Haskins responded by saying, "You were waiting for me all along, weren't you." Haskins appeared to Bryfonski to understand his rights when Bryfonski asked him if he wanted to provide any further information, he refused, saying he wanted to talk to an attorney.

Defendant Haskins argues that the statement made to Agent Bryfonski was not voluntary because the circumstances were inherently coercive. The government concedes, and the Court agrees, that Defendant Haskins was in custody from the time he was stopped and surrounded by armed police officers. He was, however, plainly

informed of his rights under Miranda. He volunteered the statement that he made in response to the Miranda warnings. The officers did not promise him anything, intimidate him, or trick him into breaking his silence. See United States v. Pinto, 671 F.Supp. 41, 58-59 (D. Me. 1987). There has been no showing that Defendant's will was overborne so that the statement was not his own free act. The totality of the circumstances were such that Defendant would believe he was in custody, but they were not nay more coercive than any other arrest situation, and no interrogation was conducted. As the Court said in Miranda, 3834 U.S. at 478, "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."[13]

---

[13]Although Defendant's amended memorandum initially argues that statements made by Haskins at the jail should be suppressed on

Defendant further argues that the government has mischaracterized the statement made after the warnings were administered, and that its significance would become clear if other statements made at the jail were considered. This is an issue for trial, not one for resolution on a motion to suppress.

Defendant Norman Panitz

Defendant Norman Panitz has also moved to suppress statements made by him to Special Agent Cunniff when Cunniff came to room 518 of the Sheraton Inn. As previously discussed, Special Agent Cunniff arrested Mr. Suarez and asked Defendant Panitz his name, to which he replied "Norman Panitz." Having heard about a Norman and his brother Bif being in Portland in connection with

---

a number of theories, no evidence was offered concerning statements made at the jail. The Court assumes the government does not intend to use any such statements and will not act on this portion of the motion.

Goldin, Cunniff, trying to further identify Panitz, asked if he had a brother Bif, to which Panitz replied affirmatively. Soon thereafter Cunniff asked again if Panitz were Bif's brother and he replied "No." Cunniff also asked if Panitz were staying at the Sheraton, to which he replied "No." Cunniff then placed Panitz under arrest. Special Agent Cunniff testified that all of these questions took place in a short span of time and that he was investigating, connecting Solomon Panitz and Norman, and formulating an opinion about whether Panitz had committed a crime. Cunniff stated when Panitz answered affirmatively regarding Bif, "I concluded -- again, this happened quickly and I concluded very quickly, after that I had probable cause and I in fact placed him under arrest within a very, very short time." Tr. 123. The second question about Bif and the question about the Sheraton

preceded Cunniff's placing of Defendant Panitz under arrest.

Defendant argues that Cunniff was required to administer Miranda warnings as soon as he had probable cause. It is clear, however, that the protection of Miranda are reserved for persons subjected to custodial interrogation and that custody is to be determined not by the intent of the officers but by the reasonable perceptions of the suspect. In Bermemer v. McCarty, 468 U.S. 420, 442 (1984), the Supreme Court addressed a similar situation, stating:

> Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Here, there is no indication that Panitz would reasonably believe he was not free to go until he was formally placed under arrest. In the few seconds between when Cunniff thought he had probable cause and when he arrested Defendant, Cunniff did not tell him of his intentions. Although there were four officers present with Cunniff, they had plainly come to arrest Suarez. The setting was a neutral hotel room, the officers did not have their guns drawn, and the questioning of Panitz was very brief and uncoercive in nature. The Court finds, therefore, that a reasonable person in Defendant Panitz's situation would not have considered himself in custody. See United States v. Quinn, 815 F.2d 153. Therefore, no Miranda warnings were required. Moreover, the "general on the scene questioning as to facts surrounding a crime," like that undertaken by Cunniff, was

not meant by the Supreme Court to require Miranda warnings. Miranda, 384 U.S. at 477.

Defendant Hertz

Trooper Curran, another state police officer, and Agent Bryfonski stopped Defendant Hertz while he was driving a gold Mercedes with Defendants Frisone and Lopopolo as passengers. Another cruiser stopped with them and a third arrived soon thereafter. The officers had been informed that the occupants might be armed, and they had seen what they construed as a furtive movement, so they approached with drawn guns and had extra cruisers on the scene.[14] The occupants were removed from the car at gunpoint, with their hands up, without the usual request by Trooper Curran indicating

---

[14]Trooper Curran testified that by the time the car was stopped there were seven or eight surveillance vehicles at the scene. Tr. 318. His other testimony indicates that perhaps there were fewer. In any event, it is plain that there was a large number of officers and vehicles present.

that the stop might be a routine traffic stop. Defendant Hertz was told to assume a spread-eagle position on the back of one of the cars and he was patted down.

Hertz was then informed by Agent Bryfonski that he was conducting a routine drug interdiction program. Bryfonski asked several questions, including under what circumstances he had come to Maine, when he had last used the Mercedes, if he had brought luggage, and if the car were his. Hertz responded to these questions. He then refused t give consent for the officers to search the trunk of his car. They did so anyway, and then Hertz was placed under arrest and advised of his rights. He now seeks to suppress the statements made before he was advised of his rights.

The Court finds that a reasonable person in Defendant Hertz position would have believed himself in custody from the

time he was removed from the car at gunpoint. The situation was inherently coercive, with many officers with guns drawn surrounding the car which he was driving. This stop did not have the trappings of a routine traffic stop, so Defendant did not necessarily have reason to believe that any questioning would be brief. He was spread-eagle and patted down. Under these circumstances, Agent Bryfonski's statement that the stop was part of a routine drug interdiction program could not have allayed a reasonable person's impression that the situation imposed restraints comparable to those of a formal arrest, i.e., that he was in custody. See Berkemer v. McCarty, 468 U.S. at 441. Under the circumstances of this arrest, Agent Bryfonski should have administered Miranda warnings before he questioned Defendant Hertz. His failure to do so requires that the Court suppress

Defendant Hertz's statements made at the scene of his arrest.

ORDER

Accordingly, it is hereby ORDERED THAT Defendant Hertz's motion to suppress his statements made at the scene of his arrest prior to being given a Miranda warning is hereby GRANTED, and his statements are hereby SUPPRESSED. Defendant Hertz's motion to suppress evidence and the motions to suppress evidence and statements of all the other Defendants, except Defendant Berzon's motion to suppress statements, are hereby DENIED.

So ORDERED.

/s/ Gene Carter
United States District Judge

Dated at Portland, Maine this 27th day of July, 1989.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	**Criminal No.**
vs.	)	**89-00002-01P**
	)	
JAY MARTIN ROSEN,	)	**(Indictment)**

Conspiracy to Possess with Intent to Distribute in Excess of 50 Kilograms of Marijuana

21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846

Single Count)

AMENDED PROCEDURAL ORDER SCHEDULING GUIDELINE SENTENCING HEARING AND IMPOSITION OF SENTENCE

The Guideline Sentencing Conference having been previously held herein, this matter is hereby CONTINUED and RESCHEDULED for a Sentencing Hearing and Imposition of Sentence on June 18, 1990 at 1:00 p.m. Counsel and the Defendant are to be present at that time and are to be prepared to present any evidence relevant to sentencing issues. Counsel represented at the

presentence conference that the time required for presentation of evidence, oral arguments of counsel, and allocation of Defendant will be approximately thirty (30) minutes.

As a result of the Presentence Conference, the Court understands from counsel that the only matters in dispute at the Hearing for purposes of determination of an appropriate Guideline Sentence are the following:

(1) Determination of the proper drug quantity amount to be utilized to determine the Base Offense Level;

(2) Whether the facts are properly found in ¶¶ 13, 16 and 58 of the Report;

(3) Whether Defendant is able to pay the minimum fine applicable under the Guidelines;

(4) The determination of the applicable Guideline; and

(5) The determination of the appropriate sentence within the applicable Guideline.

SO ORDERED.

/s/ Gene Carter

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	Criminal
	)	No. 89-00002-01P
vs.	)	Indictment --
	)	Single Count
JAY MARTIN ROSEN	)	

Conspiracy to Possess with Intent to Distribute in Excess of 50 Kilograms of Marijuana

21 U.S.C. S 841(a) (1), 841 (b)(1)(C) and 846

MEMORANDUM OF SENTENCING JUDGMENT

I. GUIDELINES COMPUTATION

A. Base Offense Level

The Court FINDS, there being no objection, as follows:

(a) The offense described by the Indictment is an offense within the meaning and contemplation of United States Sentencing Commission Guideline (hereinafter "Guideline") §§ 2D1.1(a)(3) and 2D1.4(a).

(b) The applicable Base Offense Level, as determined from Guideline §

BEST AVAILABLE COPY

> 2D1.1(a)(3), is Level "22," based upon the total amount of a substance containing marijuana involved in the offense conduct being one hundred fifty (15) pounds (51.8 kilograms) as the Court now finds.

The Court FURTHER FINDS that Defendant is eligible to have the Base Offense Level decreased to Level "20" under the provisions of § 3E1.1(a), based upon Defendant's acceptance of responsibility for the offense conduct. The Court FINDS that Defendant has accepted responsibility for the offense conduct.

Based on an Adjusted Total Offense Level of "20" and a Criminal History Category of Category III, the applicable Guideline range is forty-one (41) to fifty-one (51) months.

B. Findings

The Court finds the facts as set out in ¶¶ 1-12, 14, 15, 17-39, 48-55, 60-61, 68-80,

and 86-97 of the Report, counsel advising the Court that there is no dispute as to the facts as therein stated.

Defendant's objection to the contents of ¶ 58 has been **WITHDRAWN**.

The contents of ¶¶ 15 and 16 have been REVISED BY THE Court with the consent and agreement of the parties, and the Court FINDS the facts to be as stated in the revised paragraphs.

With the consent of the parties, ¶ 17 is hereby STRICKEN from the Report.

C. Departure

The Court concludes that there is no reason to justify a departure from the Guideline range, noting that no departure is requested by either the Defendant or the Government.

II. FINDINGS WITH RESPECT TO FINES

A.

In respect to the fine determination,

the Court FINDS (1) that the Guideline range for a fine is Ten Thousand Dollars ($10,000.00) to One Million ($1,000,000.00) under Guideline §5E4.2(c)(3) and (4); and (2) that Defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or any part of any fine, including the additional fine required by § 5E1.2(i), and such fines are hereby ORDERED to be WAIVED pursuant to the terms of subsections (i) and (f) of Guideline § 5E1.2. The court, having considered alternative sanctions in lieu of the waived fines, finds no sanction to be available.

B.

The Court Concludes that Defendant is not eligible for admission to probation under Guideline § 5D2.a(f) because the minimum term of imprisonment exceeds ten (10) months.

III. SUPERVISED RELEASE

The Court concludes that a minimum term of three (3) years of supervised release is mandated on the Indictment pursuant to Guideline § 5D3.2(3). The Court finds that a term of three (3) years supervised release is required for future protection of the public and to maximize the Defendant's potential for rehabilitation once released from incarceration.

IV. JUDGMENT

IT IS HEREBY ADJUDGED that on the Indictment herein, the Defendant be, and he is hereby, committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of fifty-one (51) months.

The Court stated the reasons for this sentence on the record at imposition of sentence.

IT IS FURTHER ADJUDGED that Defendant

all fines herein are WAIVED including the additional fine under § 5E1.2.

IT IS FURTHER ADJUDGED that on the Indictment herein, Defendant shall serve a term of Supervised Release, under § 5D3.2(a) and 21 U.S.C. § 841(b)(1)(B), of three (3) years, to commence upon his release from incarceration.

The conditions of such Supervised Release shall be those specified in Guideline § 5B1.4 (a)(1)-(13) and the "special" conditions that:

(1) Defendant not commit any crimes, federal, state, or local during the period of his supervised release;

(2) Defendant abstain from use of all contraband substances and intoxicants during the period of his supervised release;

(3) Defendant shall participate in a substance abuse therapy program at the direction of his supervising officer, which may include testing to determine whether Defendant has made any use of drugs; and

(4) Defendant shall remain gainfully

employed for compensation to the satisfaction of his supervising officer at all times during the term of his supervised release.

IT IS FURTHER ADJUDGED that Defendant pay a felony assessment of Fifty Dollars ($50.00).

Defendant's bail is hereby CONTINUED during the pendency of any authorized appeal in this case to which Defendant is a party; Defendant to appear upon order of the Court or of the Court of Appeals.

Defendant was advised of his right to appeal the sentence imposed.

/s/ Gene Carter
Gene Carter
Chief Judge

Dated at Portland, Maine this 18th day of June, 1990.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 90-1650
UNITED STATES OF AMERICA,
Appellee,
v.
JAY MARTIN ROSEN,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
(Hon. Gene Carter, U.S. District Judge)

Before
Campbell and Cyr, Circuit Judges,
and Pollak,* Senior District Judge.

Richard S. Emerson, Jr., with whom Childs, Emerson, Rundlett, Fifield & Childs was on brief for appellant.

Margaret D. McGaughey, Assistant United States Attorney, with whom Richard S. Cohen, United States Attorney, and William H. Browder, Jr., Assistant United States Attorney, were on brief for the United States.

April 5, 1991

---

*Of the Eastern District of Pennsylvania, sitting by designation.

CAMPBELL, Circuit Judge. This is another appeal resulting from an undercover operation conducted in the fall of 1988, when state and federal law enforcement officers infiltrated a marijuana importation network in Maine. See United States v. Panitz, 907 F.2d 1267 (1st Cir. 1990) (appeals of defendants Solomon Philip Panitz and Andrew Stewart Baumwald). Appellant Jay Martin Rosen was indicted with others on charges of conspiracy to possess with intent to distribute in excess of 50 kilograms of marijuana, a schedule I controlled substance listed in 21 U.S.C. § 812 (Count I), and of aiding and abetting in that offense (Count III), in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(C).[1] In a consolidated

---

[1]The indictment charged Rosen with codefendants Andrew Stewart Baumwald and Antonina M. Dinolfo. Only Counts I and III pertain to Rosen. By order of the district Court dated May 25, 1989, the indictment against Rosen and his codefendants was consolidated for trial with United States v.

pretrial suppression hearing, Rosen unsuccessfully requested the court to suppress the marijuana found in the car he was driving when arrested, and certain statements made to the arresting police officer.[2] Rosen also moved unsuccessfully to dismiss the indictment for outrageous police conduct. After the court rejected the suppression and dismissal motions, Rosen entered a conditional guilty plea to Count I pursuant to Fed.R.Crim.P. 11(a)(2),[3] and the

---

Panitz, et al., Criminal No. 89-0003-P, United States v. Frisone, Criminal No. 89-0004-P, and with United States v. Robert Berzon, et al., Criminal No. 89-0005-P, in the United States District Court for the District of Maine. The charges in all these indictments arose from interwoven events, infra.

[2]The district court's opinion on the motion to suppress evidence is reported as United States v. Baumwald, et al., 720 F. Supp. 226 (D. Me. 1989).

[3]Fed. R. Crim. P. 11(a)(2) reads:

With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty ... re-

court dismissed Count III on the government's motion. At sentencing, the judge calculated Rosen's "Base Offense Level" from the amount of marijuana found in Rosen's car (150 pounds). Rosen was sentenced on June 18, 1990 to 51 months imprisonment, a three-year term of supervised release, and a $50 fine.

Rosen now asserts as errors the district court's (1) denial of his motions to suppress evidence and statements; (2) denial of his motion to dismiss the indictment for outrageous police conduct; and (3) basing of the sentence on the amount of marijuana seized (150 pounds) rather than on a lesser amount Rosen had bargained for earlier.

I. BACKGROUND

---

serving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal should be allowed to withdraw the plea.

On November 22, 1988, Rosen was arrested with Andrew Baumwald as they headed south toward Boston on the Maine Turnpike in a BMW automobile carrying 150 pounds of marijuana in its trunk. They were part of a marijuana distribution network led by one Michael Goldin, who had arranged to have a 10,000 pound shipment of marijuana smuggled from Columbia. Unbeknownst to Goldin, the shipment was intercepted by the U.S. Coast Guard before its arrival in Maine, and the marijuana was taken into the possession of the Drug Enforcement Administration (DEA). The DEA agents, posing as smugglers, then contacted Goldin with the news that the marijuana had arrived in Maine. Goldin inspected it and induced a number of customers and their drivers, including Rosen, to drive to Maine and procure marijuana. We described as follows what

next ensued in United States v. Panitz:[4]

> Goldin devised a plan for distributing the marijuana. He would make a series of vehicles available to his accomplices (agents all), turning over the keys. The agents would drive each vehicle, as received, to the place where the marijuana was being stored, stuff it with whatever amount of marijuana Goldin specified, part at the prearranged spot, and return the keys to Goldin. The smuggler (Goldin) would then complete the transaction with the customer, exchanging a drug-laden vehicle for the balance of the agreed price.

907 F.2d at 1269. (Footnote omitted). The loaded vehicles were kept under constant surveillance by the agents, and when the cars were claimed and driven away by the customers they were followed. At a point along the road, uniformed officers stopped the vehicles, searched them, seized the

---

[4]As previously noted, our Panitz decision involved appeals by Rosen's companion, Baumwald, and by Solomon Philip Panitz, another would-be customer of Goldin who was indicted in the same general scheme (although using a different vehicle). United States v. Panitz, 907 F.2d 1267.

contraband and arrested the occupants. At 2:30 p.m on November 22, Rosen and Baumwald entered their BMW which had been loaded with 150 pounds of marijuana. As they headed south on the Maine Turnpike, they were stopped, the BMW searched, the marijuana was seized and they were arrested.

In Panitz this court reviewed two of the same issues Rosen now raises: the legality of the warrantless search of the BMW and the police's allegedly outrageous conduct in planning and conducting this "sting" operation. We sustained the vehicular search under the "automobile" exception. 907 F.2d at 1270-1271. We also held that the utilized law enforcement practices were neither fundamentally unfair nor offensive to principles of due process. Id. at 1273. We now turn to Rosen's contentions.

II. MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

A. The Automobile Search

Rosen argues that the marijuana seized from the trunk of his vehicle was the fruit of an illegal search and should have been depressed. Having considered the identical question in companion Baumwald's appeal, Panitz, 907 F.2d at 1271-1272, we are not persuaded that the search was improper nor are we any more persuaded than before that the district court erred in allowing the marijuana to be used as evidence. Thus, for the reasons stated in Panitz, we reject this claim of error.[5]

---

[5]We agree with the Fifth Circuit that:

> a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injus-

B. Statements after Arrest

After Rosen was stopped on the Maine Turnpike and the car was searched by Agent Bryfonski, Rosen and Baumwald were arrested. Bryfonski administered Miranda warnings to Rosen, and Rosen indicated that he understood them. Rosen then answered a number of questions posed by Bryfonski about where he had obtained the marijuana and whether he was under direction to make any telephone calls to anyone at that time. Rosen now argues that these statements should have been suppressed because he never indicated to Agent Bryfonski that he was

---

tice.

White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967). Here Rosen was a party to the same suppression hearing as his companion Baumwald, thus his search and seizure argument is based on identical evidence. There have been no relevant changes in the law since Panitz nor do we believe our decision in that case to have been erroneous or unjust. Accordingly, we follow that decision here.

waiving his rights. The district judge found, however, that Rosen had explicitly waived his rights under Miranda v. Arizona, 383 U.S. 436 (1966).

Reviewing the district court's findings under the strict "clearly erroneous" standard, United States v. Walker, 924 F.2d 1(1st Cir. 1991); United States v. Jobin, 535 F.2d 154, 156 (1st Cir. 1976), we find no error. The district judge's decision was based primarily on Agent Bryfonski's testimony at the suppression hearing, where he testified that after the Miranda warnings were read, Rosen appeared to understand those rights, and that he asked Rosen if he was going to answer any questions. Bryfonski then stated that "[h])is acknowledgement to me was that he was willing to answer questions." This sworn testimony of the agent supports the district judge's finding of consent by Rosen to

answer questions, and the judge's conclusion that the statements were admissible. The district court's findings, as well as its decision to credit Bryfonski's testimony, are owed deference by reviewing courts. See Jackson v. Denno, 378 U.S. 368, 390-391 (1964). We find no error by the district judge in refusing to suppress Rosen's statements to Bryfonski.[6]

III. OUTRAGEOUS POLICE CONDUCT

During pretrial proceedings, Rosen and his codefendants unsuccessfully moved to dismiss the indictments on the basis of outrageous government conduct. At issue in Panitz was the same motion to dismiss that Rosen now claims should have been granted. We defer to our discussion in Panitz, 907 F.2d at 1272-1274, and hold that the district court did not err. See n.5, supra.

---

[6]Rosen does not challenge other statements that the allegedly made to the police officers before and after his arrest.

IV. BASE OFFENSE LEVEL

Rosen's final contention is that the quantity of drugs loaded by the undercover agents into the vehicle he was driving should not have been used to tabulate the base offense level for purposes of sentencing. At sentencing, defendant's counsel explained that Rosen negotiated, paid for, and expected to received only 30 pounds of marijuana. However, Rosen was notified by the agents acting undercover, at the time he went to the parking lot to retrieve the BMW on November 22, that they had loaded the car with 150 pounds of marijuana. Counsel for Rosen acknowledged that the defendant knew at the time he got into the car and "put the key in the switch" that he was transporting 150 pounds. At the time of sentencing, Rosen was held

accountable for the full 150 pounds.[7] Rosen argues that the district court misconstrued § 1B1.3 (a)(1) of the guidelines, which states in relevant part that the base offense level shall be determined on the

---

[7]Even though not raised by the parties, we clarify a harmless mistake made at Rosen's sentencing hearing regarding the amount of marijuana. At sentencing, the district judge referred to the amount of marijuana for which Rosen was being sentenced as 150 pounds. For purposes of determining the base offense level from the drug quantity table, U.S.S.G. § 2D1.1(c), the judge determined that the amount translated into 51.8 kilograms, when it actually translates into 68.04 kilograms. The district judge, however, used the proper "base offense level" (22) corresponding to 68.04 kilograms, not 51.8 kilograms. With 51.8 kilograms Rosen's base offense level would have been 20. Thus, while the conversion of pounds into kilograms was wrong, the ultimate result - a base offense level of 22 - was correct.

With a load of marijuana of 150 pounds, a base offense level determined to be 22, a two point reduction for acceptance of responsibility, and a criminal history category of III, Rosen's applicable imprisonment guideline range was 41 to 51 months. He was sentenced to 51 months. Had the amount used to calculate the base offense level been 30 pounds, Rosen's imprisonment guideline range would have been 21-27 months.

basis of:

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense. . .

The commentary to that section explains that:

> [i]n the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant . . . . Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

U.S.S.G. § 1B1.3, comment. (n.2).

Rosen claims that a defendant should be sentenced for the conduct of others only when the conduct is jointly undertaken criminal activity which was reasonably foreseeable by the defendant. Rosen further asserts that in the instant case "the conduct of others" is that the government agents who loaded the marijuana, and it must be excluded as relevant conduct because it is a legal impossibility for a defendant to jointly undertake criminal activity, or conspire with, a government agent. Moreover, Rosen argues that in order to appraise his responsibility in terms of a quantity of drugs, the court must determine what the defendant intended to negotiate and what he could reasonably foresee. The amount of marijuana in his trunk should not be relevant conduct because Rosen did not negotiate for nor could he reasonably foresee the extent of the marijuana load.

The difficulty with this argument is that, before retrieving the loaded car and setting out on his return journey, Rosen was told by an undercover agent, posing as an accomplice, that 150 pounds had been placed in the BMW's trunk. Section 1B1.3(1)(1) calls for consideration of all acts in "furtherance of the offense." Rosen accepted delivery of a car containing 150 pounds of marijuana with full knowledge that this was the quantity he would not be possessing.[8] The district court found that after Rosen was told that the car had been loaded with 150 pounds, he did not protest

---

[8]The prosecution requested that Rosen be charged with 400 pounds of marijuana, 150 pounds from his car and 250 pounds found in codefendant Dinolfo's car. The court, however, was of the opinion that, unlike the 150 pounds in his car, Rosen did not have control over the car driven by Dinolfo. Thus, while he knew that his codefendant was transporting 250 pounds of marijuana, that was not sufficient to involve him in punishment for that. With the 150 pounds the court found that he had knowledge and full control of the car.

that he had bargained for only 30 pounds, nor did he take any steps to remove the excess amount from his car. Rather, as the court noted, "[w]hen he got in the car and put the key in the switch and turned in on, he knew he was transporting 150 pounds." Thus, while Rosen may have earlier negotiated for less, he knowingly accepted the greater amount. Counsel argued that it was too late for him then to have just walked away, but the court concluded that if Rosen had been willing "to do more than he had already committed himself t do, he did not have to make his situation worse by getting in the car and hauling more of the drugs than he understood he was going to [do]." The fining that, in effect, Rosen acted voluntarily, is not clearly erroneous, and is a sufficient predicate for holding him accountable for the 150 pounds that he consented to transport in the trunk of his

car. Whether under the law of conspiracy he could conspire with a government agent is immaterial. It was not the "conduct of others" that was key. Rather, Rosen was held responsible for his own acceptance of the larger load of marijuana. We find no error, therefore, in the district court's decision to use the full load of marijuana found in Rosen's trunk for purposes of determining the base offense level.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 90-1650

UNITED STATES,

Appellee,

v.

JAY MARTIN ROSEN,

Defendant, Appellant.

JUDGMENT

Entered: April 5, 1991

This cause came to be heard on appeal from the United States District court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano

[cc: Mr. Emerson and Ms. McGaughey]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1650

UNITED STATES,
Appellee,

v.

JAY MARTIN ROSEN,
Defendant, Appellant.

Before

Campbell and Cyr Circuit Judges,
and Pollak,* Senior District Judge.

ORDER OF COURT

Entered: April 29, 1991

Upon consideration of appellant's petition for rehearing, It is ordered that said petition be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

*Of the Eastern District of Pennsylvania, sitting by designation.
[cc: Mr. Emerson and Mrs. McGaughey]